

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Rules and Regulations)	
Implementing the Telephone)	CC Docket No. 02-278
Consumer Protection Act)	
of 1991)	
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SUPPLEMENTAL REPLY COMMENTS OF ROBERT BIGGERSTAFF

Robert Biggerstaff hereby submits these supplemental reply comments in opposition to the Petition of Soundbite Communications, Inc., (“Petitioner”) for a declaratory ruling regarding “confirmation” text messages, pursuant to the Commission’s Public Notice DA 12-511.

Petitioner’s ex parte arguments in its notice dated June 29, 2012, are not well founded, and the Commission should not succumb to them.

Courts and the Commission have vastly different obligations and powers in the construction of statutes. Courts are obligated to chose among competing interpretations of a statute by selecting the one that is the “best” fit to the statutory language.¹ On the other hand, the Commission, like any administrative agency, is empowered to adopt *any* competing interpretation of the statute. The Commission’s choice of possible constructions of a statute is not subject to being second guessed by the courts. Courts defer to the Commission’s construction even if the Commission’s construction is not “the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

Petitioner suggest that the Commission should follow the recent decision in *Ibey v. Taco Bell*

¹ Excepting, of course, special cases such as the rule of constitutional avoidance where a less-likely interpretation will be adopted over the more-likely one where the latter would cause the statute to violate the Constitution. *See, e.g., United States v. Haines*, 855 F.2d 199, 201 (5th Cir. 1988).

Corp., 2012 TCPA Rep. 2322, No. 12-CV-0583-H (S.D. Cal. June 18, 2012). This would be wholly improper. The construction of the TCPA lies in the first instance with the Commission. It is the courts that defer to the Commission's constructions and not the other way around. The *Ibey* court failed to do so, and does not even mention the Commission, despite the fact that the Commission has addressed several of the issues relevant to the case.

Furthermore, the *Ibey* court made several errors in its decision.² For example, in a portion of the opinion quoted by Petitioner, it claims that the "spirit" of the TCPA was "prevention of unsolicited telemarketing in a bulk format." The court also states that "Defendant's single, confirmatory text message did not constitute unsolicited telemarketing." Such statements demonstrate a severely flawed understanding of the TCPA. The act can not be reduced to a single "spirit" or purpose. It is a multifaceted and comprehensive regulatory system that represents many independent parts. The statute's prohibition on automated calls to cell phones is not related in any way whatsoever to telemarketing calls, much less to telemarketing "in bulk format." The TCPA applies to automated equipment making *any* calls to cell phones with a limited exception for calls of an emergency nature. There is no requirement that they be made in "bulk."³ There is no requirement that they be advertisements. There is no requirement that such calls actually be made by equipment using a random or sequential number generator – only that the equipment have a "capacity" to use such a system. The Commission has, correctly, construed "automated telephone dialing system" in the TCPA broadly in order to foreclose mischief that would surely follow. This is in keeping with the oft-cited rule in construction of remedial statutes that one should:

² Since *Ibey* is still pending, I am optimistic that additional pleadings and briefing by the parties will correct these errors in further proceedings.

³ However, in the instant case, common sense dictates that large numbers of "confirmation text messages" are likely being made, if one is sent every time someone asks that text messages be stopped.

make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.⁴

The Commission should not abjure its superordinate role in interpreting the TCPA. Nor should the Commission abdicate its responsibility to provide a unifying voice in interpreting the TCPA. The Commission should facilitate the uniform construction and application of the TCPA by providing guidance *to* the courts, not by attempting to follow a cacophony of differing interpretations from trial courts which lack the expertise, experience, and policymaking role of the Commission.

For the foregoing reasons, the Petition should be DENIED.

/s/ Robert Biggerstaff

⁴ *Heydon's Case*, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584)..